

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

February 5, 2007 Session

**GREGORY A. KEISLER v. CALVIN WALLACE, ET AL.**

**Appeal from the Chancery Court for Campbell County**  
**No. 04-166 Billy Joe White, Chancellor**

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**No. E2006-00276-COA-R3-CV - FILED JULY 31, 2007**

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Gregory A. Keisler brought this action against Campbell County and the heirs of Z.D. Baird, seeking to quiet title to 600 acres of land in Campbell County. The trial court granted Campbell County summary judgment regarding the mineral rights on the property and certified the judgment as final pursuant to the provisions of Tenn. R. Civ. P. 54.02. The plaintiff and Campbell County agree that the property at issue was combined with adjacent property for tax purposes and assessed as a whole. They also agree, as far as the issue of summary judgment is concerned, that taxes due on the mineral rights were not paid for certain years and that, as a consequence, the mineral rights with respect to the combined properties were sold at a tax sale at which the successful bidder was Campbell County. The basic issue in this case is whether there was commonality of ownership such as to support a joint assessment and later sale. Since we have determined that there is a genuine issue of material fact with respect to the commonality of ownership issue, we hold that summary judgment for Campbell County is not appropriate. The judgment of the trial court granting Campbell County summary judgment is hereby vacated and this case is remanded for further proceedings. Obviously, we reject Campbell County's contention that the plaintiff's appeal is frivolous in nature.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court**  
**Vacated; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Rob Gratigny and Brian C. Quist, Knoxville, Tennessee, for the appellant, Gregory A. Keisler.

Joseph G. Coker, Jacksboro, Tennessee, for the appellee, Campbell County, Tennessee.

Johnny V. Dunaway, LaFollette, Tennessee, for the intervenor/appellee, Bart Montanari, dba Montie's Resources, LLC.

**OPINION**

## I.

The first deed in the record pertaining to the property at issue is dated April 12, 1920. That deed evidences the conveyance of three tracts of land from J.P. Meredith to “Z.D. Baird Trustee<sup>1</sup> of Campbell County, Tennessee (“the first deed”).” The three tracts described in this deed are the 600 acres to which the plaintiff seeks to quiet title. A second deed, dated May 12, 1921 (“the second deed”), is a deed from “Winston Baird, Clerk and Master, of the Chancery Court at Jacksboro, Tennessee,” to “Z.D. Baird, Trustee, of Jellico, Campbell County, Tennessee.” It purports to convey property identical to that described as the third tract listed in the first deed. According to the second deed, this conveyance was made after a lawsuit styled “Z.D. Baird. Trustee, Nellie Webb. et al. Vs. [sic]” resulted in a court-ordered public auction. We know nothing more regarding this litigation.

There is a separate line of title, the deeds of which describe the same property described in the first deed. These other deeds involve individuals with the same surname of Baird. In 1964, *Winston Baird*’s widow and five of his heirs conveyed to *Lendon Baird* five-sevenths of a one-half undivided interest in four tracts of land in Campbell County. Three of these four tracts are identical to the three tracts described in the first deed. These three tracts are the same 600 acres to which the plaintiff seeks to quiet title in this case. The fourth tract described in the 1964 deed, which consists of approximately 330 acres, is adjacent to the subject three tracts.<sup>2</sup> In 1976, three of Winston Baird’s grandchildren executed a limited warranty deed conveying to Lendon Baird all of the grandchildren’s “right, title and interest in and to all of the estate and property of the said Winston Baird, deceased.”

The only conveyance between Winston Baird and Z. D. Baird is the second deed mentioned earlier in this opinion.

Beginning in the mid-1980’s, the four tracts of land mentioned above – which total over 900 acres – were combined for tax purposes and the minerals on the whole were assessed by Campbell County. The Campbell County Property Assessor states that notices of the assessments were sent to

Mr. Lendon Baird by regular mail under the names of Z.D. Baird and  
Lendon Baird in the ordinary course of business by the Assessor’s

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<sup>1</sup> Campbell County argues that this language establishes that Z.D. Baird held this property as trustee for some unknown person or entity. The plaintiff argues that Z.D. Baird owned the property in his individual capacity. The plaintiff asserts that the designation of “Trustee” was in error, or in the alternative, of no legal significance. The word “Trustee” is not conclusive as to the nature of Z.D. Baird’s ownership.

<sup>2</sup> The deed to Lendon Baird states that the four tracts of land “are the same lands deeded to Z.D. Baird, Trustee by J.P. Meredith, . . . by deed of the Clerk and master Z.D. Baird, Trustee, . . . and by deed of James Perkins to Winston Baird, Trustee . . . .” The first two deeds listed – (1) the deed from J.P. Meredith to Z.D. Baird and (2) the Clerk and Master’s deed to Z.D. Baird – are in the record and have already been discussed in this opinion. The intervenor in this case states in his brief that, “[o]n September 9, 1920, James Perkins conveyed a 330 acre tract of land adjacent to [the subject three tracts] to Winston Baird, Trustee.” The record does not include a copy of the deed referenced in the intervenor’s brief.

Office to Post Office Box 108, Jacksboro, Tennessee, being the same Post Office Box of Mr. Lendon Baird, to which other tax notices were sent, and which notices were not returned undelivered.

The mineral taxes on the property were never paid. On April 29, 1995, Campbell County purchased the mineral rights to the four tracts of land at a tax sale. On December 6, 1995, the trial court entered an order confirming the sale. No appeal was taken.

Almost a decade later, in early 2004, the plaintiff mailed “Property Contract[s]” to 18 heirs of Z.D. Baird. The documents set forth each respective heir’s interest in the three tracts of land listed in the first deed, *i.e.*, the 1920 deed to Z.D. Baird. The “Property Contract[s]” state that the plaintiff agrees to pay a specified amount of money – an amount commensurate with each heir’s proportionate share – for the heir’s individual interest in the three tracts. All but one of the heirs of Z.D. Baird that received the document signed and returned it to the plaintiff.

On July 26, 2004, two other heirs of Z.D. Baird conveyed, by way of quit-claim deed to David Smith, their interests in the subject three tracts of land. On the same day, Smith conveyed the interest that he had just acquired in the three tracts to the plaintiff by way of a warranty deed.

In September 2004, the plaintiff filed a complaint in the instant action to quiet the title to, and partition, the three tracts of land described in the first deed. The complaint reflects as defendants Campbell County and the heirs of Z.D. Baird to whom the “Property Contract[s]” had been sent by the plaintiff. The complaint requests that the trial court (1) declare the parties’ rights in the subject three tracts; (2) enter an order of partition pertaining to the one heir that did not sign the “Property Contract”; and (3) set aside the delinquent tax sale at which Campbell County had obtained the mineral rights in the property.

In November 2004, the widow and sole surviving heir of Lendon Baird conveyed to Bart Montanari, doing business under the trade name Monties Resources, LLC, (“Montanari”), an unspecified interest in the combined four tracts of land that Lendon Baird had received via the 1964 conveyance from Winston Baird’s widow and heirs. As previously mentioned, three of these tracts are the same three tracts to which the plaintiff seeks to quiet title. Montanari filed a motion to intervene in the plaintiff’s action. The trial court granted that motion.

In response to the plaintiff’s complaint, Campbell County filed a motion to dismiss, and later an amended motion to dismiss. Among other things, Campbell County asserted in its motions that

the plaintiff's cause of action was barred (1) by T.C.A. § 67-5-1401<sup>3</sup> in view of the fact that no appeal was timely taken to the county board of equalization regarding the subject tax assessment; (2) by T.C.A. § 67-5-2504(b)<sup>4</sup> because no money was tendered with respect to the assessment prior to the delinquent tax sale; and (3) by T.C.A. § 67-5-2504(c)<sup>5</sup> because the plaintiff did not tender the amount of Campbell County's successful bid "and all taxes subsequently accrued, with interest and charges."

The trial court granted Campbell County's motion, finding, as stated in its subsequently-entered order, that

. . . it is undisputed that no appeals were ever made to the Campbell Country Board of Equalization pertaining to the subject mineral tax assessment, as required by Tennessee Code Annotated Section 67-5-1401 and under Tennessee law generally.

The Court also finds that it is undisputed that no amount of taxes, penalties, interest and costs, in any amount, was paid into either the office of the Trustee for Campbell County, Tennessee, or the office of the Clerk and Master for Campbell County, Tennessee, as required

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<sup>3</sup> T.C.A. § 67-5-1401 (2006) provides, in pertinent part, as follows:

If the taxpayer fails, neglects or refuses to appear before the county board of equalization prior to its final adjournment, the assessment as determined by the assessor shall be conclusive against the taxpayer, and such taxpayer shall be required to pay the taxes on such amount . . . .

<sup>4</sup> T.C.A. § 67-5-2504(b) (2006) states that

[a] tax deed of conveyance shall be an assurance of perfect title to the purchaser of such land, and no such conveyance shall be invalidated in any court, except by proof that the land was not liable to sale for taxes, or that the taxes for which the land was sold have been paid before the sale; and if any part of the taxes for which the land was sold is illegal or not chargeable against it, but a part is chargeable, that shall not affect the sale, nor invalidate the conveyance thereunder, unless it appears that before the sale the amount legally chargeable against the land was paid or tendered to the county trustee, and no other objection either in form or substance to the sale or the title thereunder shall avail in any controversy involving them.

<sup>5</sup> Subsection (c) of 67-5-2504 provides that

[n]o suit shall be commenced in any court of the state to invalidate any tax title to land until the party suing shall have paid or tendered to the clerk of the court where the suit is brought the amount of the bid and all taxes subsequently accrued, with interest and charges as provided in this part.

by Tennessee Code Annotated Section 67-1-901(a),<sup>6</sup> and/or 67-5-2504(b), and/or 67-5-2504(c), and under Tennessee law generally.

And the Court, upon making such findings, and upon review of the applicable law, . . . determined that there was no need to address the other issues raised in such Motion to Dismiss by Campbell County, Tennessee, as Amended, and that the said Motion to Dismiss, as Amended, as to Campbell County, Tennessee, should be granted and sustained and that this action should accordingly be dismissed as to Campbell County, Tennessee.

(Footnote added). The trial court directed that its order as to Campbell County be entered as a final judgment after the court made “an express determination that there [wa]s no just reason for delay.” *See* Tenn. R. Civ. P. 54.02. The plaintiff appeals from the judgment of the trial court pertaining to Campbell County.

## II.

In this case, materials outside the pleadings, *e.g.*, affidavits, answers to interrogatories, and deeds, were filed as a part of the record and not excluded by the trial court. *See* Tenn. R. Civ. P. 12.02. This being the case, Campbell County’s motion to dismiss was properly treated and disposed of as a motion for summary judgment. *Id.* *See also Owner-Operator Indep. Drivers Assoc. v. Concord EFS, Inc.*, 59 S.W.3d 63, 67 (Tenn. 2001). On appeal, such a motion presents a pure question of law. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Accordingly, our review is *de novo* with no presumption of correctness as to the trial court’s judgment. *Robinson*, 952 S.W.2d at 426. The moving party is entitled to summary judgment if the facts properly before us reflect that there are no genuine issues of material fact and that the undisputed material facts show, without doubt, that the moving party is entitled to a judgment as a matter of law. *Id.* “The movant must either affirmatively negate an essential element of the nonmovant’s claim or conclusively establish an affirmative defense.” *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998) (citing *Byrd*, 847 S.W.2d at 215 n.5). In assessing the proof before the trial court, we must view the evidence in a light most favorable to the nonmoving party, and we must draw all reasonable inferences in favor of that party. *Byrd*, 847 S.W.2d at 210-11.

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<sup>6</sup> T.C.A. § 67-1-901(a) (2006) provides that

[i]n all cases where not otherwise provided in which an officer, charged by law with the collection of revenue due the state, shall institute any proceeding, or take any steps for the collection of the sum alleged or claimed to be due by the officer from any citizen, the person against whom the proceeding or step is taken shall, if that person conceives the same to be unjust or illegal, or against any statute or clause of the constitution of the state, pay the revenue under protest.

### III.

The plaintiff argues that the tax assessment at issue and the subsequent sale of the property's mineral rights to Campbell County are invalid (1) because the county did not have the authority to "combine the property owned by and titled to Z.D. Baird, and/or his heirs and successors, with property owned by Winston Baird, and/or his heirs and successors, for taxation purposes"; and (2) because the heirs of Z.D. Baird, the plaintiff's predecessors-in-interest, did not receive sufficient notice of the tax assessments and tax sale since, as acknowledged in the Campbell County Property Assessor's affidavit, notices were only sent to Lendon Baird, an heir of Winston Baird.<sup>7</sup>

The Supreme Court has stated that

it is basic to [a suit to collect delinquent taxes's] validity and vitality that the taxpayer be before the court by actual or constructive service of process. *Naylor v. Billington*, 213 Tenn. 614, 378 S.W.2d 737 (1964). These suits have as their objective the enforcement of tax liens, but not by confiscation. Where the taxpayer is not properly before the court the resulting decree and sale is a nullity as to him and may be assailed at any time. *Tennessee Marble & Brick Co. v. Young*, 179 Tenn. 116, 163 S.W.2d 71 (1942). See also *Naylor*, *supra*. If it be established on remand that the tax sale was void, [T.C.A. § 67-5-2504(d), the statute providing a 3-year statute of limitations for the challenging of a tax sale] is not applicable.

\* \* \*

But again the applicability of th[e] Code section must yield to the proposition that a void decree will not support a tax title and the statute presupposes a valid vestiture of title in the purchaser. *Naylor v. Billington*, *supra*.

Thus it is that the final determination of the Chancellor must ultimately depend upon the proof with respect to notice. This Court will not look with favor upon an attack made upon a tax sale, where the taxes sued for were actually delinquent and unpaid at the time of the sale and adequate public notice was given.

***Rast v. Terry***, 532 S.W.2d 552, 555-56 (Tenn. 1976) (footnote omitted). The plaintiff asserts, and this is critical, that there is simply no evidence to support a finding that the heirs of Z.D. Baird and

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<sup>7</sup> The plaintiff also asserts that the assessment and tax sale should be invalidated because there is no proof that minerals have ever been extracted from the subject property. Given our resolution of this case, it is unnecessary to address this issue.

the heirs of Winston Baird jointly owned the property at issue; thus, according to his argument, the notices sent to Lendon Baird, an heir of Winston Baird, were not sufficient to provide adequate notice to the heirs of Z.D. Baird.

Campbell County's motion to dismiss raises a number of defenses: (1) the plaintiff lacks standing to bring the alleged cause of action<sup>8</sup>; (2) the plaintiff's complaint fails to state a claim upon which relief can be granted; (3) the plaintiff's cause of action is barred by T.C.A. § 67-5-1401 because an appeal before the county board of equalization was never requested with respect to the subject tax assessment; (4) the plaintiff's cause of action is barred by T.C.A. § 67-5-2504(b) because no money was tendered with respect to the assessment prior to the delinquent tax sale; (5) the plaintiff's cause of action is barred by T.C.A. § 67-5-2504(c) because he did not tender the amount of Campbell County's successful bid to purchase the mineral rights "and all taxes subsequently accrued, with interest and charges"; (6) the plaintiff's cause of action is barred by T.C.A. § 67-5-2504(d)<sup>9</sup> because it was brought outside the three-year statute of limitations for invalidating a tax sale; (7) the plaintiff's action is barred by T.C.A. § 28-2-110(a)<sup>10</sup> for failure to pay the subject mineral taxes "for a period of twenty (20) years"; and (8) the plaintiff's cause of action is barred by laches.

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<sup>8</sup> Neither Campbell County nor Montanari cites any authority supporting the proposition that a successor-in-interest lacks standing to challenge the validity of a tax sale that occurred at a time when the predecessor-in-interest of the plaintiff owned the property. Cf. *Lee v. Harrison*, 270 S.W.2d 173 (Tenn. 1954). The *Lee* case involved similar facts. The plaintiff in that case, as in the instant case, sought to set aside a tax sale that occurred when his predecessor-in-interest owned the land. *Id.* at 173-75. The trial court invalidated the tax deed. *Id.* at 176. The Supreme Court tacitly acknowledged the plaintiff's standing in that case. *Id.* at 177. Montanari cites the second petition to rehear in the *Lee* case to support the idea that the plaintiff in the instant case lacks standing. However, the issue on the second rehearing in *Lee* was whether the plaintiff had standing to question the validity of a certain statute on the ground that the statute was retrospective. *Id.* at 181. The Supreme Court concluded that only persons who had a vested interest in lands at the time that the statute in question was enacted could raise such a question with respect to the statute's validity. *Id.* The case does not stand for the proposition that a plaintiff successor-in-interest generally lacks standing to challenge the constitutionality of a tax sale that occurred prior to his or her ownership.

<sup>9</sup> Subsection (d) of 67-5-2504 provides as follows:

No suit shall be commenced in any court of the state to invalidate any tax title to land after three (3) years from the time the land was sold for taxes, except in case of persons under disability, who shall have one (1) year in which to bring suit after such disability is removed.

<sup>10</sup> T.C.A. § 28-2-110(a) (2000) states the following:

Any person having any claim to real estate or land of any kind, or to any legal or equitable interest therein, the same having been subject to assessment for state and county taxes, who and those through whom such person claims have failed to have the same assessed and to pay any state and county taxes thereon for a period of more than twenty (20) years, shall be forever barred from bringing any action in law or in equity to recover the same, or to recover any rents or profits therefrom in any of the courts of this state.

The parties' arguments before this Court can be narrowed down to one pertinent issue – whether the record establishes that the heirs of Z.D. Baird and the heirs of Winston Baird jointly own the four tracts of land jointly assessed for mineral taxes by Campbell County and whose mineral rights were ultimately sold at the tax sale. The plaintiff argues that the *lack of* commonality of ownership in the subject property establishes that the assessments, notices, and subsequent tax sale should be voided. The linchpin of the arguments raised by Campbell County and Montanari is commonality of ownership in that property. They assert that the heirs of Z.D. Baird and the heirs of Winston Baird owned the four tracts jointly and that, therefore, the notices sent in this case were sufficient. Hence, so the argument goes, because notice was proper and because the plaintiff failed to comply with the statutory requirements, the plaintiff's cause of action is barred.

In addition to the deeds already mentioned in this opinion, Campbell County and Montanari point to several items in the record which they claim establish commonality of ownership in the subject four tracts of land. The record includes a copy of the final settlement of the estate of Z.D. Baird in probate court. The settlement, which is dated May 1955, provides the names of eight heirs of Z.D. Baird and the following pertinent language:

[I]t being agreed that any remaining property of the estate (*which consi[s]ts of a one-half interest in about 800 acres of land located near Elk Valley, in Campbell County, Tennessee, the other half interest of which is owned by the Winston Baird estate, adjoining property of Elk Valley Coal & Iron Company; and about 340 acres of land located on the waters of Stinking Creek, 4th District of said County*) will not require administrative action by the Executors and Trustees of the Z.D. Baird Estate, inasmuch as same will be managed and handled by the respective owners thereof without the necessity of further action by said Executors and Trustees.

(Emphasis added). Campbell County and Montanari allege that this statement by the plaintiff's predecessors-in-interest acknowledges that the estate of Winston Baird owned a one-half interest in the three tracts of property described in the first deed and the adjoining tract.

The record also includes, and Campbell County and Montanari further cite, a 1981 complaint filed in the trial court by the heirs of Z.D. Baird against Lendon Baird, Lendon Baird's wife, and the Winston Baird Estate. The complaint, which primarily requests an accounting from the defendants, sets forth the following pertinent facts and allegations:

The complainants would show that they are the heirs at law of Z.D. Baird and entitled to inherit from the Z.D. Baird Estate and further that they comprise all of the heirs of the Z.D. Baird Estate.

*That the Z.D. Baird Estate and the Winston Baird Estate owns certain lands in Campbell County, Tennessee and that the two estates were*



*partners in said land and had business relations in the transactions of debits and credits entering in the account of either Z.D. Baird and/or Winston Baird Estate as a result of the partnership dealing.*

That the defendant, Lendon Baird, resides in Campbell County, Tennessee, owns land in Campbell County, Tennessee, and is one of the heirs at law of Winston Baird. That Lendon Baird was given and did assume the fiduciary capacity of handling all of the transactions and disbursements of funds and making proper accounting between the Z.D. Baird Estate and the Winston Baird Estate. That the last such accounting as alleged was made by the defendant, Lendon Baird, in 1976.

*That the two estates owned land jointly approximating over 800 acres.* That said land contains coal and that said coal has been mined and that the defendant, Lendon Baird has not rendered any accounting of any nature since 1976.

(Emphasis added; paragraph numbering in original omitted). The parties to the 1981 complaint subsequently filed an “Agreed Judgment,” which sets forth the parties’ agreed-upon division of the mining royalties that, according to this pleading, stemmed “from partnership lands belonging to the Z.D. Baird and Winston Baird Estates.”

The record also includes a copy of a 1988 Court of Appeals opinion in the case of ***Mountcastle et al. v. Baird et al.***, 1988 WL 5682 (Tenn. Ct. App. W.S. at Knoxville, filed January 29, 1988). Though the posture and ultimate issue in that case are not relevant to the instant case, Campbell County and Montanari assert that the following excerpt taken from the facts section of that opinion supports a finding that the heirs of Z.D. Baird and the heirs of Winston Baird co-owned the subject four tracts at issue:

Defendant Lendon Baird was the principal officer of the Elk Valley Coal & Iron Company (Elk Valley) which was incorporated in 1898. Elk Valley, however, has since become a defunct corporation as its charter was revoked in 1939 due to the non-payment of franchise and excise taxes. Baird, since 1946, has continued to manage the business affairs of Elk Valley as if it were still a corporation. He took it upon himself to arrange the “stockholders” meetings and the election of “directors” and “officers.”

Elk Valley owns approximately 8,000 acres of land in Scott and Campbell Counties, Tennessee. *Adjacent to this property lies approximately 900 acres of land owned by Baird and the Z.D. Baird heirs under an oral partnership agreement (the partnership*

*property*). In addition, contiguous to and interspersed with the Elk Valley property lies between 8,000 and 9,000 acres of land owned by Baird and his family.

In 1967, Baird, the partnership, and Elk Valley leased the mineral rights of all three tracts of land, between 17,000 and 18,000 acres, to the Farrell Mining Company (Farrell). The record does not show when Farrell started mining, but in 1976 Baird realized that mining operations were going on in an area which involved his personal property, the partnership property, and the Elk Valley property.

*Id.*, at \*1 (emphasis added). Campbell County and Montanari also note that, according to the Property Assessor's affidavit, the combined property was known as the "Z.D. Baird and Lendon Baird lands."

It is abundantly clear from this evidence that, at one point in time, the Baird family owned a substantial amount of land in Campbell County. It is also clear that, at one point, the heirs of Z.D. Baird and the heirs of Winston Baird jointly owned some "800" or "900" acres of property in Campbell County. What is not clear is whether the "800" or "900" acres which, at one time, were owned jointly by the heirs of Z.D. Baird and the heirs of Winston Baird *includes the 600 acres that is the subject of the plaintiff's complaint*. The plaintiff alleges that the subject 600 acres was improperly lumped with adjoining property for tax purposes. He says this was improper because there was no commonality of ownership between the owners of the 600 acres and the owners of the adjoining property. Campbell County contends that all of the combined property was jointly owned by the heirs of Z.D. Baird and the heirs of Winston Baird. Maybe so, but *maybe* is not good enough. The "bottom line" is that the material in the record upon which Campbell County relies does not clearly establish this commonality of ownership. This material does not negate the allegations of the complaint as to Campbell County and it does not establish any of the county's affirmative defenses, all of which necessarily rely upon a commonality of ownership for their validity. If the 600 acres at issue in the instant case were owned solely by the heirs of Z.D. Baird, the notices upon which the county relies do not establish that constitutionally-sufficient notice was given to the owners of the 600 acres with respect to (1) the tax assessment and (2) the tax sale. Appropriate notice is at the core of due process. *Phillips v. State Bd. of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993) ("A fundamental requirement of due process is notice and an opportunity to be heard.").

When we evaluate the evidence before us at this "on-the-papers" stage of the proceedings, in a light most favorable to the plaintiff, as we are required to do, we conclude that there is a genuine issue of material fact. Was there, as the plaintiff argues, no commonality of ownership, or was there, as contended by the county, joint ownership? This is the critical issue. The evidence before us does not answer this question. Summary judgment is not appropriate based upon the record before us.

IV.

Campbell County requests that we award it damages on the basis that this appeal is frivolous. In view of our decision in favor of the plaintiff, *i.e.*, the appealing party, this successful appeal can hardly be characterized as frivolous.

V.

The judgment of the trial court is vacated. This case is remanded to the trial court for further proceedings. Costs on appeal are taxed to the appellee, Campbell County, Tennessee.

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CHARLES D. SUSANO, JR., JUDGE